PRIVY COUNCIL.

MUHAMMAD YUSUF KHAN (DEFENDANT) *v.* ABDUL RAHMAN KHAN (PLAINTIFF).

*P. C.** 1889 *February 20.*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Superintendence of High Court—Code of Civil Procedure (Act XIV of 1882), s. 622.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code.

APPEAL by special leave (31st December 1886) from an order (June 22nd, 1886), of the Judicial Commissioner of Oudh.

The suit out of which this appeal arose was brought on the 2nd April 1883, by the present respondent, in the Court of the Subordinate Judge of the Lucknow District, against the appellant, for a declaration that a document purporting to have been signed by the plaintiff on the 1st June 1882, and undertaking that he should pay Rs. 30 a month to the defendant, was a forgery. The defence was that the document was genuine, and to this was added that it had been decided, in a previous suit, so to be.

The Subordinate Judge, on 17th December 1883, found the document genuine, and dismissed the suit. This decree was upheld by the District Judge of Lucknow on the 11th June 1884. According to his judgment, two words, not however material to the effect of the writing, had been added. No appeal (ss. 584 and 585 of Act XIV of 1882) lay to any Appellate Court against these concurrent judgments, but the Judicial Commissioner, on application by the plaintiff, consented, as he conceived himself to be empowered by s. 622 of the Code of Civil Procedure to do, to revise the proceedings of the District Judge. He did so, reversing the decree which had been made in the defendant's favour, and granting to the plaintiff the relief which he sought, on 10th November 1884. His ground for doing so was that, as the District Judge had found that two

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words had been added to the disputed document, this threw upon the defendant the burthen of showing when they had been added, and as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document. This Judicial Commissioner, Mr. Young, left the Court shortly after this decision, and his successor, Mr. Tracy, on 23rd February 1885, reversed the decision of his predecessor, being of opinion that, even if the District Judge had been wrong, his error was not one that could be set right under s. 622. The Courts had found that the document which the plaintiff had sought to cancel was genuine. He quoted the judgment in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) as follows: "It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." This gave to him, as he considered, no alternative but to find that the order of 10th November 1884 was passed without jurisdiction, and obliged him to set aside this order, which seemed to have followed an erroneous ruling of a Full Bench of the Allahabad High Court, *viz.*, *Moulavi Muhammad* v. *Syed Hussan* (2). The result was to restore the decision of the District Judge dismissing the suit.

In 1886, Mr. Young resumed charge of the office of Judicial Commissioner, and to him the plaintiff applied to set aside the last order, *viz.*, that of 23rd February 1885. This application was granted on 22nd June 1886, by the order now under appeal. The Judicial Commissioner pointed out that the application was for the review of an order made in review, prohibited by s. 629; he also considered s. 622 to be inapplicable. But he referred to two cases in which orders made were revised, *viz.*, *Tafuzzal Hossein Khan* v. *Raghonath Pershad* (3) and *Rajender Narain Rae* v. *Bejai Govind Singh* (4); and, on the supposed ground that the order of 23rd February 1885 was one which the Court

(1) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.
(2) I. L. R., 3 All., 203.
(3) 7 B. L. R., 186.
(4) 2 Moore's I. A., 209, 252.

would not have made, if it had been duly informed, reversed it, and restored the order of 10th November 1884.

Special leave to appeal was granted, in regard to the law, by order dated 31st December 1886.

Mr. *J. D. Mayne* for the appellant, submitted that, even if the decision of the District Judge of 11th June 1884 was wrong (which it was not), still his error could not be taken to be within the meaning of s. 622. The order of 23rd February 1885 was accordingly right. The final decision of the Judicial Commissioner of 22nd June 1886 was wholly without jurisdiction.

After his statement of the case, their Lordships called on Mr. *C. W. Arathoon*, for the respondent, who argued that Mr. Young's first order, *viz.*, that of 10th November 1884, was right. The question of the materiality of an addition to a document was a question of law,—*Yame* v. *Lother* (1); and the point that the District Judge had omitted to consider afforded ground for revision. He referred to *Amrit Lal* v. *Madho Das* (2); *Amir Hussan Khan* v. *Sheo Baksh Singh* (3).

No reply was called for.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN.—In this case, on the 10th of November 1884, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing, he proceeded on an erroneous interpretation which had been placed on s. 622 of the Civil Procedure Code by the Court of Allahabad, and in ignorance of the fact that the error had been corrected by a judgment of this Board in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), to which Her Majesty gave effect by Her order of the 26th of June 1884. The order of Mr. Young was brought before Mr. Tracy, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd of February 1885, Mr. Tracy, having regard to the decision of the Privy Council, discharged the order of Mr. Young. Fifteen months afterwards the matter was again brought before Mr. Young on an application purporting to be

(1) L. R., 1 Ex. D., 176. (2) I. L. R., 6 All., 292.
(3) I. L. R., 11 Calc., 6 : L. R., 11 I. A., 237.

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made under s. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

On the 22nd of June 1886, Mr. Young discharged the order of Mr. Tracy on the singular ground that it was made *per incuriam*, and that it was an order which the Court would not have made if it had been duly informed. From that order of Mr. Young, special leave to appeal to Her Majesty has been granted.

Mr. *Arathoon*, who appeared for the respondent, admitted that he could not contend that Mr. Young had any jurisdiction to pronounce the order of the 22nd June 1886, but he argued that Mr. Tracy's order was wrong, and that Mr. Young's first order was right.

Their Lordships, however, are of opinion that Mr. Tracy was perfectly right in discharging the first order of Mr. Young; and that neither of Mr. Young's orders can be supported upon any ground whatever.

Their Lordships therefore are of opinion that the order of the 22nd of June 1886 ought to be reversed, and the order of the 23rd of February 1885 affirmed, and that the respondent should pay the costs of the proceedings before Mr. Young, in which the order of the 22nd June 1886 was made. They will therefore humbly advise Her Majesty accordingly; and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Young, Jackson, & Beard.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

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LUCHMAN SINGH (DEFENDANT) *v.* PUNA AND ANOTHER (PLAINTIFFS).

P.C.* 1889 *February* 21 & 22.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Second Appeal—Code of Civil Procedure (Act XIV of 1882), ss. 584, 585—Jurisdiction to hear a second appeal, on what matters—Admission of secondary evidence—Evidence Act (I of 1872), ss. 65, 66.

Under ss. 584 and 585 of the Code of Civil Procedure 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure.

On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2), whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document.

Held, that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court.

Both the above questions were decided in the affirmative by their Lordships: the *first*, on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (I of 1872), ss. 65,66: the *second* also in the affirmative, because, the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine.

APPEAL from a decree (13th February 1886) of the Judicial Commissioner, modifying a decree (12th May 1885) of the Commissioner of the Jubbulpore Division, which varied a decree (9th March 1885) of the Deputy Commissioner of the Jubbulpore District.

The suit giving rise to this appeal related to a question of title, and the main question of fact between the parties was decided

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by the Courts in succession (1) in favour of the plaintiffs, respondents. They alleged that Ramchandra their father, by gift from one Kali Baboo, was the proprietor of village Natwara, and upon their father's death his widow Massammat Munna, who succeeded, allowed the defendant appellant to manage for her; with the result that he purchased in his own name other villages out of the profits of Natwara. Such villages they claimed as the heirs of their father on the death of their mother in 1884. They claimed also buildings and moveables.

The defendant's case was that Natwara descended from Kali to his daughter Munna, who made a gift of it on 23rd August 1870 to the defendant, with other property. He had other matters of defence; but this much is all that is necessary to explain what was the deed of gift alleged to have been made by Kali.

Both the original Court, the Deputy Commissioner, and the Court of First Appeal, the Commissioner, found the alleged gift to Ramchandra to have been made. But the original deed of gift was not forthcoming, and a copy was admitted in evidence.

As to this, the Judicial Commissioner, in his judgment on appeal preferred to him under ss. 584 and 585 of the Code of Civil Procedure 1882, expressed the opinion stated in their Lordships' judgment; and refused to hold that the Courts below had been wrong in admitting it in evidence.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant for whom the argument mainly was that there was no legal proof that Kali had made the gift in question.

The respondents did not appear.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The sole question raised in this appeal is a question of fact, whether Kali Baboo made a gift of his estate to Ramchandra, under whom the respondents claim. If there

(1) When the suit was filed, 23rd July 1884, the Act giving the series of the Courts was XIV of 1865, then in force. On the 1st January 1886, when the suit was pending in the Judicial Commissioner's Court, Act XVI of 1885, the Central Provinces Civil Courts Act came into operation, repealing the former, and again stating the Courts in their order.

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was no such deed of gift, the title of the appellant is a good one, but if there was, then the respondents, being the heirs of Ramchandra, are entitled to the decree which they have got.

The question has been before three Courts, and they have all decided in favour of the gift. They have held that it is proved by a deed of which secondary evidence was given.

The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Section 585 of the Code of 1882 says :—"No second appeal shall lie except on the grounds mentioned in s. 584." Those grounds are : "The decision being contrary to some specified law or usage having the force of law, or the decision having failed to determine some material issue of law or usage having the force of law," or for substantial defect in procedure. It is not alleged here that there is any defect of procedure. Therefore, in order that this appeal may succeed, there must be some violation of law.

This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner has been applied for, and their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, *first*, whether a case arose for admitting secondary evidence, which was a proper question of law ; and, *secondly*, whether the evidence that was admitted was really and truly secondary evidence.

With regard to the case for admitting secondary evidence their Lordships refer to the Evidence Act of 1872. It says :— "Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are : "When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when the original has been destroyed or lost, or when the party offering evidence of its

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contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In this case there is evidence of two witnesses, of whom certainly one, and probably both, assisted at what they call a ceremony, in which Kali Baboo made over the property to Ramchandra, and told the people present, the villagers, the ryots or cultivators, that Ramchandra was the malik. There is the evidence of one witness that he was present at the signing of a deed, which he says was stated to be a deed of gift from Kali Baboo to Ramchandra, and there is the evidence of another witness that Kali Baboo told him that there had been such a deed of gift. Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence, cannot be doubted. The Courts below have found that all the documents belonging to the estate passed into the hands of the appellant, and therefore that the deed in question is in his power, or has been destroyed or lost,

Then what is the secondary evidence which is let in ? It is a copy of a deed which was filed in another suit, and is still on the records of the Court. That deed is endorsed: " Copy in accordance with the original," and it is signed by the Judge presiding in the Court. Their Lordships accept the opinion of the Judicial Commissioner upon the value of that copy. His words are these: "There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by Kali Baboo, and the only question is whether that copy had been compared with the original, when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorized to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy." Their Lordships entirely concur with that opinion. When the copy is looked at it establishes the deed of gift on which the respondents rely.

There was another question raised with respect to some goods and chattels—some moveable property. It was said that the

appellant, having been in possession of the estate rightfully under a deed of gift from Ramchandra's widow, was entitled to the income during that time, and the Judicial Commissioner has, to a certain extent, given effect to that contention by adjudicating to the appellant the ownership of some villages which it appears that, during that period, he purchased out of the surplus or savings from the income. But besides the land, he received a certain quantity of chattels, which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him, and not to the estate. So far as there is stock and plant belonging to the three villages, which the Judicial Commissioner has adjudicated to the appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the respondents, their Lordships think that the appellant is in the position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the appellant any more stock or plant than belongs to the three villages which he has given to him.

The result is that the appeal fails in every respect, and their Lordships, therefore, must humbly recommend Her Majesty to dismiss it. There will be no costs, as the respondents do not appear.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B. *Appeal dismissed.*

* *P. C.* 1889 *February* 23, 27 *and April* 3.

HEMANGINI DASI (PLAINTIFF) *v.* KEDARNATH KUNDU CHOWDHRY (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Hindu Law—Partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutaváhana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeeomony Dossee v. *Attaram Ghose* (1) referred to and approved.

APPEAL from a decree (29th July 1886) of the High Court (2), reversing a decree (11th April 1885) of the Second Subordinate Judge of the Hughli District.

The question raised on this appeal related to the rights of a widow to maintenance, her deceased husband having left sons, of one of whom she was the mother, and a partition taking place among them.

The object of the suit was to establish against the whole estate of the deceased, Taracharan Kundu Chowdhry, who died in April 1865, the right of the plaintiff as his widow to maintenance; and when it was instituted on the 13th September 1884, there had been no partition among his sons, who were Hurrish Chunder, his son by the plaintiff, and two other sons by a wife who predeceased her husband, *viz.*, Kedernath and Annoda Pershad. The latter dying in 1882, left a widow and two minor sons, whose guardian was Kedarnath. The latter, the present respondent, represented when this suit was brought two-thirds of the paternal estate.

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(1) Macnaghten's Cons. H. L., p. 64.

(2) I. L. R., 13 Calc., 336.

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On the 11th November 1884, after the institution of this suit, Hurrish Chunder brought two other suits against Kedarnath himself, and in his capacity of guardian of the wards, for an account and a partition of the joint estate of Taracharan deceased. Hemangini Dasi, the plaintiff in this suit, was stated in Hurrish Chunder's plaints to have been made a party by reason of her having instituted this suit; but no issue was recorded, or decided, as to her rights to maintenance; and, on the 20th February 1886, decrees in those two suits, declaring Hurrish Chunder's right to one-third of his father's estate generally, directed an account and partition.

In the present suit the widow claimed a decree for Rs. 300 for her maintenance, and Rs. 200 for religious observances, and that these sums might be declared charges on the whole estate of the late Taracharan. By the effect, however, of the decrees for partition obtained by Hurrish Chunder, whom his mother had made a defendant along with Kedarnath (though Hurrish Chunder did not defend or appeal), two principal questions arose in the present suit, which had been instituted before the other two suits. These questions were the following:—

The first of them was whether the Courts below, when dealing with the question as to the plaintiff's right as a widow to have suitable maintenance awarded to her out of the entire estate of her late husband, were justified in taking into their consideration a state of facts, *viz.*, the decrees above referred to for partition which did not exist till after the institution of the present suit. And the second question was, assuming the affirmative of the first, whether the effect of a partition between the plaintiff's step-son and step-grandchildren on the one side, and her own and only son on the other, by which partition the latter took a separate third share, was or was not, by Hindu law, to discharge Kedarnath's and his wards' two-thirds shares from the plaintiff's claim for maintenance, limiting that claim to the share of Hurrish Chunder, her own son, both in matter of amount and as regards security.

As to the first of these questions, the Subordinate Judge was of opinion that, as the present suit was instituted before the partition proceedings, the latter would not affect the plaintiff's

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claim. And as to the second, he referred to the case, relied on by the respondent, of *Jeeomony Dossee* v. *Attaram Ghose*, cited at p. 64 of Sir F. Macnaghten's Considerations on Hindu Law, where a point is stated as to whether a mother (not a party to that suit) of an only son, her husband having left other sons was entitled on partition between her son and the other sons to a separate share; and it was determined that she was not so entitled, but must look to her son for maintenance. And the Subordinate Judge was of opinion that, as the mother referred to in that case was not a party to the suit, the question as to her right never properly rose in her absence, and the decision could not guide him.

He made a decree for what he considered to be a suitable maintenance (allowing no arrears or back maintenance) *viz.*, Rs. 180 by the year; and he directed that the appellant might realize two-thirds of this amount from the respondent, as representing two-thirds of the entire estate, and the remaining one-third from the share of her son, Hurrish Chunder.

Kedarnath appealed to the High Court, the plaintiff cross-appealing, because the decree gave her less than she claimed.

The High Court (Petheram, C. J., and Ghose, J.) did not maintain the judgment of the first Court, but, as to the first of the above questions, held that they were bound to take the subsequent partition into consideration, and to make such a decree as would be consistent with the true estate of the family, as it existed at the time they were dealing with it.

As to the second question, they held that, up to the time of the decree for partition defining the separate shares of the members of the family, the plaintiff was entitled to claim her maintenance against the whole estate; and subsequently thereto, to claim her maintenance only against the share allotted to her son: but that, as after a separation between the sons and Hemangini in February 1883, the latter had received her maintenance from her own son Hurrish Chunder alone, she had no claim for maintenance against her step-sons; with the result that so far as Kedarnath and his wards were concerned, the suit ought to be dismissed.

Accordingly, reversing the decree of the lower Court, the High Court dismissed the suit against him; and their decree declared

the plaintiff entitled, from the time of her separating from her son, Hurrish Chunder, to be paid by him out of that portion of the estate of his late father Tarachand Kundu now in his hands, Rs. 150 a month as maintenance. The judgment of the High Court is reported in I. L. R, 13 Calc., 336.

The plaintiff, having obtained a certificate that the suit fulfilled the requirements of s 596 of the Civil Procedure Code, appealed to the Queen in Council, on the ground that she had a right to maintenance out of the whole estate of her deceased husband, upon which the charge for her maintenance should continue, even after partition amongst her son and step-sons.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the High Court was wrong in holding the effect of the partition to be to make the maintenance of this widow a charge only on her own son's share in the family estate, and proportionate only to the value of that share. They contended that, on the contrary, by the Hindu law, the widow's maintenance was regarded as a charge upon, and proportionate to, the whole estate of her deceased husband. It was in conformity with the family distribution made by that law that the widows should share, and share alike, in the whole estate. It had been rightly taken as beyond a doubt, in the High Court, that her maintenance, if she had been childless, would have been a charge on the whole estate, not affected by any partition. Also, a widow having sons but no step-sons, and having lived with them whilst the family continued joint, would be on a partition entitled to a share equal to that allotted to a son, and her rights might be shown by supposing a case of a widow having three sons of her own, there being three other sons not by her; in such a case her right would be to have a one-seventh share in the whole estate, and not merely a one-fourth of a half. There was no authority for a change being made in the widow's position, as a consequence of a partition which she could neither bring about nor avert. The right of a widow to her maintenance arose by marriage. It existed during the life of the husband, who could not free himself from it, and it attached upon the whole inheritance which he left, immediately upon his death.

Reference was made to Strange's Hindu Law, Edn. 1830, Vol.

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I, pp. 171, 291, Vol. II, Appendix to Chap. VIII, pp. 290, 307; Dayabhaga, Chap. III, sec. 1, para. 12, and sec. 2, paras. 29, 30, and 31; Macnaghten's Principles of Hindu Law, Vol. I, Chap. IV, of Partition, Vol. II, Chap. V; Jaganatha Colebrooke's Transl., Book V; Macnaghten's Cons. on Hindu Law, p. 60: *Jeeomony Dossee v. Attaram Ghose* (1); *Sheodyal Tewaree* v. *Jadunath Tewaree* (2); *Nittokissoree Dassee* v. *Jogendronath Mullick* (3); *Madhavkeshav Tilak* v. *Gangabai* (4).

It was in regard to the mother's rights over the father's estate that she had her claim to maintenance and to a share; and there was no authority for the opinion that the mother took a share of her son's share. It was incorrect to say that a widow's maintenance was a charge on a son's share; it being, on the contrary, a charge that took priority of any rights upon partition, that dated from her marriage, that affected the whole estate of her husband as a charge thereon; and a charge which like the husband's debts must be provided for. More than one text supported the view that it was a charge upon the whole estate.

Strange's Hindu Law, Vol. I, Chap. Partition; Vol II, Precedent at pp. 351, 352, 353, with notes by Ellis, Colebrooke, and Sutherland, at the latter page; West and Buhler, Hindu Law (Bombay) p. 791.

Her share, if she took a share, was a charge on the whole property in the hands of all the sons. She was an inchoate heir till she had issue, and with her original right to charge the whole estate she remained, that right being paramount to the son's right to partition. This was not, in effect, contravened by the decision in *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (5). The mother's right was to maintenance attaching over the whole estate; but, if she took a share in lieu, her right was to a share equal to that of her son, and this was the measure of it.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, argued in support of the decision of the High Court. The question was completely covered by the authority of decided cases, according to which the plaintiff, on the partition of the family estate, was entitled to have her maintenance charged

(1) Macnaghten's Cons. H. L., p. 64.
(2) 9 W. R., 62.
(3) L. R., 5 I. A., 55, 56.
(4) I. L. R., 2 Bom., 639.
(5) I. L. R., 15 Calc., 292.

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upon and paid out of the share of her own son only, she not being entitled to charge the shares of her step-sons, as well as that of her own son. Upon the partition, the widow ceased to belong to one family with the step-sons, and had no claim upon their shares in the divided estate.

Reference was made to Jaganatha's Digest (Colebrooke), Book V, Chap. II, para. 89, and a sentence in the Commentary thereon referring to the opinion of Jímútaváhana and the rest; Dayabhaga, Chap. III.

Sir F. W. Macnaghten, in his "Considerations" published in 1824, cited decisions of 1809, 1811 and 1813, (see p. 39; also pp. 48, 51, 60, 66 and 75) showing that this was the settled law in 1814.

In 1821, there was the decision in *Krisnanund Chowdree* v. *Rookeenee Dibia* (1); and in 1866, there was a case to the like effect in *Cally Churn Mullick* v. *Janova Dassee* (2) decided by Mr. Justice Phear.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on a subsequent day (3rd April) by

SIR R. COUCH.—The appellant is the widow of Taracharan Kundu, who died on the 19th of April 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedarnath (the respondent) and Annoda Pershad, by another wife who died before him. Annoda Pershad died in June 1882, leaving a will by which Kedarnath was appointed executor of his estate. The suit was brought on the 13th September 1884 by the appellant, against Kedarnath in his own right and as executor to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016-9-3 on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on

(1) 3 Sel. Rep. (1827), p. 70. (2) 1 Ind. Jur., N.S., 284.

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the 6th December 1884, of a written statement by Kedarnath, Hurrish Chunder, who attained his majority on the 3rd November 1882, instituted two suits against Kedarnath, and others, members of another branch of the family, who were co-sharers with Taracharan in different properties, for a partition of the joint family property. This was stated in the written statement of Kedarnath, and it was pleaded that, if the plaintiff was entitled to any maintenance, her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February 1886, decrees for partition were made in those suits. The judgment of the High Court, on appeal from the Subordinate Judge, was given on the 29th July 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition, the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated in food and worship, she having been maintained in the family of her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedarnath.

The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Taracharan remained joint and undivided, the plaintiff was, no doubt, entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Dayabhaga, Ch. III, sec. 1, vv. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives, the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow

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that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jímútaváhana, it is a settled rule that a widow shall receive from sons who were born of her, an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. (Colebrooke's Digest, Book V, Ch. II, v. 89, 3rd Ed., Vol. II, p. 255.) In Sir F. Macnaghten's Considerations on Hindu Law, p. 64, a case in the Supreme Court of *Jeeomony Dassee* v. *Attaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Attaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three half-brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided, it was an *obiter dictum*. The question did arise between Attaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to be taken into account in making the partition, is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition, it was declared, in accordance with the authority in Colebrooke's Digest, before noticed, that the first wife was entitled to one-fourth of the three-seven parts of her sons, and the second wife to one-third of the two-seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

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The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Tottenham, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Beverley.

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July 15.

QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT.*

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—*Penal Code, s.* 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

* Full Bench on Criminal Appeal No. 327 of 1889, against the decision of F. H. Harding, Esq., Officiating Sessions Judge of Chittagong, dated the 11th March 1889.